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19-P-113

Appeals Court

WINTHROP RETIREMENT BOARD vs. ANGELO A. LaMONICA & others.¹

No. 19-P-113.

Suffolk. December 5, 2019. - September 9, 2020.

Present: Massing, Henry, & McDonough, JJ.²

Public Employment, Forfeiture of pension, Police. Public Employee Retirement Administration Commission. Police Officer. Res Judicata. Laches. Administrative Law, Findings, Preclusive effect of decision, Substantial evidence. Evidence, Hearsay.

Civil action commenced in the Superior Court Department on January 24, 2017.

The case was heard by Paul D. Wilson, J., on motions for judgment on the pleadings.

Michael Sacco for the plaintiff.
Nicholas Poser for Angelo A. LaMonica.

¹ Justices of the East Boston Division of the Boston Municipal Court Department, as nominal parties.

² Justice McDonough participated in the deliberation on this case and authored this opinion while an Associate Justice of this court, prior to his reappointment as an Associate Justice of the Superior Court.

HENRY, J. Angelo A. LaMonica was a police officer when he filed false tax returns for the years 1988 through 1993 in violation of 26 U.S.C. § 7206. In 1996 and 2002, counsel for the Winthrop retirement board (board) advised the board that LaMonica's pension could not be forfeited. After press inquiries, the board gathered more information, conducted a hearing in 2016, and voted to order forfeiture of LaMonica's pension. The board concluded that the income LaMonica failed to report on his income tax returns was paid to him so that he, in his capacity as a police officer, would "turn[] a blind eye to the illegal operation of video poker machines in certain private establishments in Winthrop." This case thus requires us to consider whether, pursuant to G. L. c. 32, § 15 (4), LaMonica's convictions for filing false income tax returns for the years stated require forfeiture of his retirement pension.

General Laws c. 32, § 15 (4), inserted by St. 1987, c. 697, § 47, provides that "[i]n no event shall any member [of the State employees' retirement system] after final conviction of a criminal offense involving violation of the laws applicable to his office or position, be entitled to receive a retirement allowance."³ Because there was a direct factual link between

³ The statute applies to "'member[s]'" of a public employee retirement system. In this opinion, we generally use the term 'public employee' rather than 'member'; every member is or was a

LaMonica's position as a public employee and his criminal conviction of filing false tax returns, he is ineligible to receive a retirement allowance. Accordingly, we vacate the judgment of the Superior Court and remand the case to that court for the entry of a judgment vacating the judgment of the Boston Municipal Court (BMC) and remanding the case to the BMC for further proceedings.

Background. LaMonica was employed by the Winthrop Police Department from 1964 through January 1995, when he retired as police chief. Upon his retirement, LaMonica began receiving a pension from the Winthrop retirement system.

On April 5, 1995, LaMonica was indicted on several Federal charges: (1) extortion under color of official right in violation of 18 U.S.C. § 1951; (2) conspiracy to obstruct enforcement of State gambling laws in violation of 18 U.S.C. § 1511; and (3) filing false income tax returns for the years 1988 through 1993 in violation of 26 U.S.C. § 7206.⁴

public employee." Public Employee Retirement Admin. Comm'n v. Bettencourt, 474 Mass. 60, 61 n.1 (2016).

⁴ Then, as now, the Internal Revenue Code, codified at 26 U.S.C. § 7206, provides: "Any person who . . . (1) . . . [w]illfully makes and subscribes any [tax] return, statement, or other document, which contains or is verified by a written declaration that it is made under the penalties of perjury, and which he does not believe to be true and correct as to every material matter, . . . shall be guilty of a felony."

In July 1995, LaMonica pleaded guilty to a superseding information charging him with six counts of filing false tax returns and in November 1995 the indictment was dismissed. The superseding information stated that "[a]t all times material to this information," LaMonica "was a sworn officer of the Winthrop Police Department." It recited that "Raymond Magee and his associates engaged in and collected money from the operation of video poker gambling machines, which were installed in certain private clubs in Winthrop, Massachusetts, and which were owned by Jackson Industries, d/b/a Action Jackson Amusements of Malden, Massachusetts."⁵ It further recited that LaMonica "was president of the Winthrop Police Association, a benevolent association of present and former Winthrop police officers." It also stated that "[a]t all times material to this information Telco Communications, Inc. was a telemarketing fund-raising company which contracted with the Winthrop Police Association to raise money in annual drives in 1987 through 1989." The six counts of filing false Federal income tax returns to which LaMonica pleaded guilty charged that he had failed to disclose income he received from Telco Communications, Inc. (Telco), for

⁵ The surname Magee is sometimes spelled "McGee" in the record. As is our practice, we use the spelling in the charging document unless we are quoting.

the years 1988 and 1990, and payments of money from Magee in the years 1988 through 1993.

The sentencing judge adopted the factual findings in the presentence report, though not the recommended sentence. As set forth in that report, "First as [l]ieutenant, then as [c]hief of the Winthrop Police Department, [LaMonica] received illegal payments including an initial payment of \$1,000, then \$100 per week, for the next [fourteen] years, from Raymond McGee, to cover-up the video poker machines in the town of Winthrop." The plea colloquy is not included in the record.

LaMonica was sentenced to a period of fourteen months' incarceration, one year of supervised probation after his release from incarceration, and was ordered to pay a \$20,000 fine.

Meanwhile, the board notified LaMonica that it was reviewing his "recent conviction [sic] in regards to the effect it may, or may not have on [his] retirement benefits," and in December 1995, the board notified him that it would address the issue at its January 31, 1996, meeting. At that meeting, the board was advised by counsel that, "based on the actual conviction [sic]," it had no right to withhold LaMonica's retirement pension. Accordingly, the board took no further action with respect to LaMonica's pension.

Nearly seven years later, on January 16, 2003, in response to a request for information from the Public Employee Retirement Administration Commission (PERAC), the board provided to PERAC a copy of successor counsel's opinion regarding LaMonica's 1995 criminal convictions and its impact on his ability to receive his retirement pension. In that December 9, 2002, counsel opinion, board counsel "opined that based on the facts provided, there did not appear to be any direct correlation between LaMonica's criminal convictions and his official duties."

On January 12, 2016, the board notified LaMonica that it would be reviewing at its January 26, 2016, meeting whether the board should institute proceedings pursuant to G. L. c. 32, § 15 (4). The board voted to institute proceedings and held a formal hearing on February 23, 2016. LaMonica was present and represented by counsel. LaMonica stipulated that he was the same person convicted of filing false tax returns. The board admitted numerous exhibits. LaMonica objected to the documents produced by the United States District Court for the District of Massachusetts other than the superseding information in case no. 95-10225, the judgment dated November 13, 1995, and the amended judgment entered in that case. He specifically objected to "parts of the sentencing memorandum that contain allegations that were included in offenses that were dismissed." The board overruled the objection. LaMonica was sworn as a witness. He

was asked who Raymond Magee was, and his counsel directed him not to answer. Board counsel cautioned that the admitted exhibits allow one to "reasonably draw an inference" that the funds being received "relate[d] back" to LaMonica's employment, and so, the purpose of the question was to give LaMonica the opportunity to clarify or provide testimony. Board counsel noted for the record that LaMonica had the opportunity to answer questions and declined to do so.

On April 25, 2016, the board voted to implement a G. L. c. 32, § 15 (4), pension forfeiture, finding that LaMonica's criminal convictions were violations of the laws applicable to his office or position pursuant to the State pension forfeiture statute. The board demanded that LaMonica remit to the Winthrop retirement system the sum of \$882,051.85 paid through November 13, 1995.

LaMonica challenged the board's decision in an action for judicial review filed in the BMC pursuant to G. L. c. 32, §§ 15 (4), 16 (3). The judge vacated the board's decision. The board then filed the present certiorari action in the Superior Court pursuant to G. L. c. 249, § 4.⁶ A Superior Court judge,

⁶ "General Laws c. 249, § 4, provides for limited judicial review in the nature of certiorari to correct errors of law in administrative proceedings where judicial review is otherwise unavailable." State Bd. of Retirement v. Bulger, 446 Mass. 169, 173 (2006).

after a hearing, allowed LaMonica's motion for judgment on the pleadings. The judge reasoned in a thoughtful decision that while LaMonica's alleged behavior was reprehensible, "the Board simply was not entitled to rely on his alleged acceptance of payoffs, because the indictments relating to those payoffs" -- conspiracy to obstruct enforcement of State gambling laws and extortion under color of office -- "were dismissed." "LaMonica pleaded guilty only to crimes that did not involve 'violation of the laws applicable to his office or position' within the meaning of G. L. c. 32, § 15 (4)." This appeal followed.

Discussion. 1. Res judicata. As a threshold matter, the parties dispute whether the board's decisions in 1996, and again in 2003, not to go forward with forfeiture proceedings barred its subsequent action taken in 2016 requiring LaMonica to forfeit his pension. We conclude that the board was not precluded in 2016 from initiating a formal forfeiture proceeding pursuant to G. L. c. 32, § 15 (4), and that res judicata does not apply in the circumstances of this case.

"A pension forfeiture under 'G. L. c. 32, § 15 (4), is mandatory and occurs by operation of law [It] is an automatic legal consequence of conviction of certain offenses.'" State Bd. of Retirement v. Woodward, 446 Mass. 698, 705 (2006), quoting MacLean v. State Bd. of Retirement, 432 Mass. 339, 342-343 (2000). After LaMonica was convicted in Federal court of

filing false income tax returns (as discussed infra, based on his failure to claim certain income derived from Magee and Telco at a time when he was a police officer), it was mandatory, by operation of law, for the board to institute pension forfeiture proceedings against LaMonica under G. L. c. 32, § 15 (4). See Retirement Bd. of Somerville v. Buonomo, 467 Mass. 662, 663-664 (2014).

In addition, res judicata does not apply because neither of the board's decisions in 1996 nor 2003, based on advice from counsel not to make a full review of the facts or pursue formal proceedings, constituted a "final judgment" as prescribed by the doctrine. "'Res judicata' is the generic term for various doctrines by which a judgment in one action has a binding effect in another. It comprises 'claim preclusion' and 'issue preclusion.'" Duross v. Scudder Bay Capital, LLC, 96 Mass. App. Ct. 833, 836 (2020), quoting Heacock v. Heacock, 402 Mass. 21, 23 n.2 (1988). For the doctrine to operate, a "final judgment" is required. See Kobrin v. Board of Registration in Med., 444 Mass. 837, 843 (2005), quoting Tuper v. North Adams Ambulance Serv., Inc., 428 Mass. 132, 134 (1998); Duross, supra at 836-837, quoting Kobrin, supra. Moreover, "[i]n the absence of statutory limitations, administrative agencies generally retain inherent authority to reconsider their decisions." Moe v. Sex Offender Registry Bd., 444 Mass. 1009, 1009 (2005).

Here, the board considered the applicability of the pension forfeiture statute as to LaMonica in 1995 and 1996. However, its review in 1995 and 1996 cannot be construed as a final adjudication. It sought guidance from prior counsel and decided that it could not act. It did not hold a hearing. In 2002, the board again sought the advice of its counsel based on the information provided regarding LaMonica's criminal convictions, again with no further hearings or evidence, and again decided it could not act. Based on the foregoing, the board was within its right to conduct a formal hearing in 2016, in which it sought and was provided (apparently for the first time) with more extensive documentation related to LaMonica's criminal convictions and the Federal proceedings. In the 2016 hearing, LaMonica was allowed to appear, testify, and contest the evidence for the first time in this matter. Thus, a final review of the matter was concluded in 2016, and not in previous considerations by the board. We conclude that res judicata does not apply in this instance. See Woodward, 446 Mass. at 708 ("It would be illogical to permit the board to accomplish by inattention or inaction what it is prohibited from doing as a matter of discretion").

2. Laches.⁷ LaMonica asserts that Winthrop's right to impose pension forfeiture is barred by the equitable defense of laches,⁸ and that we may affirm the judgment under this doctrine. "Laches is an unjustified, unreasonable, and prejudicial delay in raising a claim. . . . Laches is not mere delay but delay that works disadvantage to another" (quotations and citation omitted). Colony of Wellfleet, Inc. v. Harris, 71 Mass. App. Ct. 522, 531 (2008). However, "the doctrine of '[l]aches does not run against public rights.'" Weston Forest and Trail Ass'n v. Fishman, 66 Mass. App. Ct. 654, 658 (2006), quoting Carnegie Inst. of Med. Lab. Technique, Inc. v. Approving Auth. for Sch. for Training Med. Lab. Technologists, 350 Mass. 26, 30 (1965). "A common thread underlying our reluctance to apply principles of estoppel to public entities has been the idea that deference to legislative policy should trump individual acts or statements of a government official that may be contrary to such policy." Sullivan v. Chief Justice for Admin. & Mgt. of the Trial Court, 448 Mass. 15, 30-31 (2006). LaMonica cites no cases to cause us

⁷ "[P]ension forfeiture proceedings under § 15 (4) are not subject to any statute of limitations." Woodward, 446 Mass. at 699.

⁸ LaMonica's petition for review filed in the BMC pursuant to G. L. c. 32, §§ 15 (4), 16 (3), asserted a number of claims, including Federal and State constitutional challenges to the forfeiture.

to vary from the rule that laches does not run against public rights.

3. Forfeiture pursuant to G. L. c. 32, § 15 (4). We review the record to determine if the board's decision is supported by substantial evidence. See Doherty v. Retirement Bd. of Medford, 425 Mass. 130, 135 (1997). "Substantial evidence" is "such evidence as a reasonable mind might accept as adequate to support a conclusion" (citation omitted). Id. "General Laws c. 249, § 4, provides for limited judicial review in the nature of certiorari to correct errors of law in administrative proceedings where judicial review is otherwise unavailable." Bulger, 446 Mass. at 173. "We may 'correct only a substantial error of law, evidenced by the record, which adversely affects a material right of the plaintiff'" and "may rectify only those errors of law which have resulted in manifest injustice to the plaintiff or which have adversely affected the real interests of the general public." Garney v. Massachusetts Teachers' Retirement Sys., 469 Mass. 384, 388 (2014), quoting Massachusetts Bay Transp. Auth. v. Auditor of the Commonwealth, 430 Mass. 783, 790 (2000).

Massachusetts appellate courts "uphold pension forfeitures in a narrow set of circumstances: those where [the public employee] had either (1) engaged in criminal activity factually connected to his or her position or (2) violated a law expressly

applicable to public employees or officials." Essex Regional Retirement Bd. v. Swallow, 481 Mass. 241, 248 (2019). In other words, there must be a direct factual or legal link "between the criminal offense and the [public employee]'s office or position." Id. at 247. Here, the board acknowledges that LaMonica's convictions do not, on their face, reference his position or duties as a police officer. Nonetheless, the board alleges there is a direct factual link between LaMonica's position as a police officer and his convictions. That raises the question of what documents the board could properly rely on to determine whether such a factual link exists.

In the vast majority of pension cases, the public employee of the State employees' retirement system pleads guilty to one or more criminal charges, and the facts of that plea presented at the forfeiture hearing are not disputed. See, e.g., State Bd. of Retirement v. Finneran, 476 Mass. 714, 715 n.3 (2017). Here, although LaMonica pleaded guilty, the record does not include the transcript of the colloquy conducted at the time of his plea. Instead, we have the superseding information, which LaMonica does not dispute, and the sentencing report. At the board's hearing, LaMonica objected to admission of the sentencing report to the extent it "contain[ed] allegations that were included in offenses that were dismissed."

"[T]he board is authorized to make factual findings and may admit and give probative weight to 'the kind of evidence on which reasonable persons are accustomed to rely in the conduct of serious affairs.'" Dell'Isola v. State Bd. of Retirement, 92 Mass. App. Ct. 547, 550 (2017), quoting G. L. c. 30A, § 11 (2), inserted by St. 1954, c. 681, § 1. "The hearing officer may assign probative value to evidence 'only if it bears the requisite "indicia of reliability."'" Dell'Isola, supra, quoting Scully v. Retirement Bd. of Beverly, 80 Mass. App. Ct. 538, 545 n.9 (2011). This case is a good example of the importance of the board's ability to make factual findings. Otherwise, prosecutors and a public employee could avoid the pension forfeiture statute through deft plea negotiations without any consideration of or even to thwart G. L. c. 32, § 15 (4). LaMonica candidly acknowledges that the plea bargain was designed to avoid pension forfeiture. As he puts it, he pleaded guilty "to a quid but not a quo." However, a Federal prosecutor does not have the power to waive the application of the General Laws. See MacLean, 432 Mass. at 342 (settlement agreement and release in civil suit connected to public employee's guilty pleas did not release public employee from forfeiture; "the Attorney General does not have the power to waive the application of the General Laws").

It is undisputed that the board could not rely on the dismissed charges. It also is true that the crime of filing false income tax returns was not dependent on LaMonica's position as a police officer or being the chief of police. The board is not so restricted, however. It can consider the superseding information, which undisputedly is properly in the record, and other reliable documents. The superseding information states that LaMonica was at all relevant times a police officer, and it explains Magee's connection to video poker games and describes Telco. It does not allege that any money LaMonica received from them were illegal payments or made in violation of any criminal statutes. The question the superseding information leaves unanswered is whether the money was paid to him in his capacity as a private citizen or as a police officer. Certainly, being a police officer is not an element of the crime of filing a false income tax return, and there was no reason to allege that fact unless the receipt of the money was factually linked to LaMonica's employment as a police officer. We, however, do not have to rely on an inference from the superseding information.

As the board found, the factual link between LaMonica's position as a police officer and the illegal payments is provided in the presentence report. That document was in a packet of documents produced by the Federal court. LaMonica

argues that that report is hearsay and not subject to cross-examination and that it does not meet the standard of substantial evidence in G. L. c. 30A, § 11. While LaMonica is correct that the report is hearsay, that alone does not undercut its admissibility and reliability. See Dell'Isola, 92 Mass. App. Ct. at 550. The documents relating to the Federal convictions provide that the defendant may object in writing to any material in the report. The docket is devoid of any such objection. More importantly, the Federal judge adopted the factual findings in the presentence report.⁹ Thus, it was sufficiently reliable for the board to consider it. This evidence is such that a reasonable mind might accept it as adequate to support a conclusion. See id.

Our decision in Dell'Isola is instructive. Dell'Isola was a correction officer who was arrested on a charge of trafficking in over twenty-eight grams of cocaine in violation of G. L. c. 94C, § 31 (a) (4); he was convicted after a jury trial of the lesser-included offense of possession of cocaine. See Dell'Isola, 92 Mass. App. Ct. at 549. We held that the board in

⁹ LaMonica notes that video poker machines were entirely lawful in the relevant time frame unless they paid off a winner in cash. If the prize was more games, it was legal and not gambling. See Commonwealth v. Club Caravan, Inc., 30 Mass. App. Ct. 561, 563-564 (1991). This, however, does not overcome the Federal judge's adoption of the sentencing recommendation or the strong inference that the payments were made to cover up illegal video poker machines.

that case properly considered copies of Dell'Isola's postarrest interview and the arrest report even though "both were hearsay and neither was certified as a copy of an exhibit admitted at the criminal trial, so they [could not] be assumed to be facts that the jury considered in convicting him," because they had indicia of reliability. Id. at 550. We concluded that it was permissible for the board there to make findings of fact related to how Dell'Isola came into possession of the cocaine. Id. at 551. Because Dell'Isola used his position as a correction officer to come into possession of the cocaine through a series of communications facilitated by an inmate, his actions were "inextricably intertwined" with his position as a correction officer. Id. at 553-554. Here, the presentence report has as much indicia of reliability as the documents in Dell'Isola, because LaMonica had the opportunity to object to them and did not and the Federal judge adopted the factual findings in the report.

LaMonica's reliance on Scully, 80 Mass. App. Ct. at 538, is unpersuasive. In Scully, police executed a search warrant of a librarian's home in the course of an investigation of whether he had committed sexual misconduct with a minor that he met at the library. Scully, supra at 539. At the home they discovered child pornography on his home computer. Id. Scully was indicted on seven counts of possession of child pornography, one

count of providing obscene matter to a minor, and one count of indecent assault and battery on a person age fourteen or older. Id. at 539-540. For reasons that did not appear on the record, the indecent assault and battery charge was dismissed. Three years later, Scully pleaded guilty to two counts of possession of child pornography and the Commonwealth filed a nolle prosequi on each of the remaining charges. See id. We held there that the convictions did not provide the required factual link to Scully's position; he did not use his position to facilitate the crime of which he was convicted. Id. at 543. Moreover, the board's finding that Scully showed the minor the same child pornography for the possession of which he was convicted was based almost entirely on Scully's refusal, pursuant to the Fifth Amendment to the United States Constitution, to answer the question whether he showed that same child pornography to the minor. See id. at 544. We held that "'a case adverse to the interests of the party affected [must be] presented' before an adverse inference may be drawn." Id. at 544-545 (citations omitted).

Here, there was substantial evidence to allow the board to find the direct factual link between the payments by Magee to LaMonica that were the basis for the convictions of filing false income tax returns, as those payments were "inextricably intertwined" with his position as a police officer. The board

did not rely on the dismissed indictment. Rather, the board relied on a sentencing report that was adopted by the Federal judge and that made the direct factual link between LaMonica's position as a police officer and the illegal payments he received to cover up the video poker machines. Moreover, the board held an evidentiary hearing, explained to LaMonica that the admitted exhibits allowed one to "reasonably draw an inference" that the funds being received "relate[d] back" to LaMonica's employment, and provided LaMonica the opportunity to clarify or provide the testimony.

Here, unlike in Scully, the adverse inference the board drew was not to meet its burden of proof. Using properly admitted exhibits and reasonable inferences, the board presented a case that the requisite factual link between LaMonica's convictions and his employment existed to warrant pension forfeiture. Accordingly, the board could find additional support for its factual findings by drawing an adverse inference from LaMonica's refusal to testify. See Maher v. Justices of the Quincy Div. of the Dist. Court Dep't, 67 Mass. App. Ct. 612, 617 (2006) (substantial evidence included "the reasonable inferences that could be drawn from the plaintiff's refusal to testify at the board hearing").

We therefore conclude that the board's decision that there was a direct factual link between LaMonica's position as a

police officer and the crimes to which he pleaded guilty was supported by substantial evidence, and that G. L. c. 32, § 15 (4), and the case law interpreting it, mandate forfeiture.

Conclusion. As there was a direct factual link between LaMonica's position as a public employee and his criminal convictions, the judgment of the Superior Court is vacated and a new judgment shall enter in the Superior Court vacating the judgment of the BMC and remanding the case to the BMC for consideration of any additional challenges LaMonica makes, including the constitutionality of the assessed penalty under the Eighth Amendment to the United States Constitution.

So ordered.